No. 7986

United States
Circuit Court of Appeals

For the Ninth Circuit.

OAKLAND HOTEL COMPANY, a Corporation,
Appellant,

vs.

CROCKER FIRST NATIONAL BANK OF SAN FRANCISCO, CENTRAL BANK OF OAKLAND, KATE M. PALMANTEER, THOMAS A. CRELLIN, JAMES K. MOFFITT, WILLIAM B. FAVILLE, RALPH W. KINNEY, EDMOND A. SOULE & JAMES A. WAINRIGHT,
Appellees.

APPELLANT'S BRIEF

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PACIFIC BRIEF PRINTING CO., BERKELEY—SAN FRANCISCO

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STATEMENT OF FACTS

The record in this case reveals that there was never any sincere attempt to reorganize the Oakland Hotel Company for the benefit either of the debtor, Oakland Hotel Company, or for the benefit of the bondholders and creditors. If the proceedings herein had followed the orderly procedure outlined by the act and there had been full considera-

tion given to a plan or plans of reorganization, after which the lower court found that it could not approve any such plan or plans, we would not be burdening this already overworked court with an appeal in this case, but from the very beginning herein, the trustee and his attorney and the attorneys for the bondholders committee were determined that this proceeding should be dismissed. They were opposed to the remedial purposes of the act, section 77B of the Bankruptcy Act, and the debtor, petitioner herein, and his attorneys, have had to consume their time in fighting this continual pressure upon the courts to have this proceeding dismissed rather than in furthering and accomplishing the plan of reorganization, although it was determined in the course of the proceeding that this property should be reorganized. (See the first Report of the Special Master of December 19, 1934 (Trans., p. 89).) Most of the record, as the court will observe, was taken up with this fight to dismiss the proceeding. The trustee and his attorney and the bondholders committee even opposed the giving of notices to the stockholders and creditors which was a jurisdictional prerequisite to the filing of claims by the stockholders and creditors. They even opposed the filing of claims by the stockholders and creditors as a necessary prerequisite (Trans., p. 168). We were continually fighting over these matters of procedure. The Master in Chancery from the beginning seemed disposed to dismiss this proceeding but after an exhaustive fight he finally deter-

mined that the petition of the debtor was filed in good faith and "that there is need for reorganization of the corporation", as will appear from the transcript of testimony submitted to him. There never was any full consideration of any plan of reorganization. The proceedings of Monday, June 3, 1935 (Trans., p. 409), show that there was no chance of any consideration of a plan of reorganization proposed or any other plan of reorganization. We ask the Court to read carefully the proceedings of that date. They will see that there was no hearing of any plan of reorganization. We are not concerned with technicalities in this appeal except as they show that the purposes and spirit of Section 77B of the Bankruptcy Act are ignored and the debtor, petitioner, was not given the benefit of the consideration of any plan. We are also constrained to add that the petitioner herein, Oakland Hotel Company, a family corporation, gave evidence throughout its career of being concerned with the welfare of its creditors as well as of itself. The Chas. Jurgens Co. took over this property in 1917. At that time there was this bond issue on the property of $750,000.00 which had been placed on the property in 1910. They invested in the property over a Million, Two Hundred Thousand ($1,200,000.) Dollars. They mortgaged their other property in order to pay the debts of the debtor. In fact, they sacrificed a magnificent holding in Oakland of four or five million dollars in order to carry on this hotel (Trans., pp. 369, 370, 371). In fact, for seven

years they made this hotel pay an income save and except paper depreciation, called Building Depreciation, (See the exhibit prepared by Mr. Louvou, Debtor's Ex. No. 12 (Trans., p. 363).), being a summary of the income, expenses, operating profit, taxes, depreciation of the company from the year 1913 to the year 1933. The testimony of the opposing creditors was restricted to the period from 1929 to 1934, which is no criterion of anything in this case, as these were the years of the depression. Still, the Creditors' Opposition to the Debtor's Request for Order Placing Debtor in Possession (Trans., p. 64-73) shows that they claimed that during the Barker management the hotel was holding its own. It is these aspects which distinguish this case from such cases as the *San Francisco Building Corporation, Ltd.*, v. *Leigh M. Battson, as trustee,* decided by this Court on March 17, 1936. In otherwords, we are confronted with a case here which the opposing creditors have tried to treat summarily and our time has been consumed in fighting a continual putsch to dismiss and no bona fide sincere attempt has been made to assist in any reorganization plan or to try to work out any such plan for the benefit not only of the debtor but of the bondholders themselves, and it will end, if end it must, in a forced sale of this property in which the bondholders will be the losers, although it is a magnificent property, a civic betterment to the City of Oakland and if properly handled it may at least increase in value inuring to the benefit of the bondholders and saving an equity

for the company. There was no approval or disapproval of a plan after hearing, as in the Battson case.

This is the real purpose of the remedial legislation known as Section 77B of the Bankruptcy Act, but we say frankly to this Court that in this prolonged fight we have been faced with an opposition to the Act of Congress itself, a lack of sympathy with the processes of the act, an assumption that the property now belongs to the bondholders or, may we say, the bondholders committee, and that in taking advantage of the act, the Oakland Hotel Company interposed an illegitimate obstacle to the acquirement of the property by real estate speculators. For these reasons we present this appeal, not for any purposes of delay. As practising lawyers at this Bar we have no desire to consume the time of this Court with a frivolous appeal. We only desire to have this Court examine the record and see for themselves if there is any succour which can be extended to this corporation and to determine in their high equity powers whether they will send the cause back to the lower court for a full consideration of any plans which have been or may be submitted. We realize that the bondholders have not accepted the plan submitted but it has never been properly presented to them. The bondholders committee have kept the matter in their own hands. Section 77B, subdivision (b), clause 5, sub clause (d) has never been tried out. It has never been found that this

plan or any other plan did not equitably and fairly provide protection for the creditors.

It is for these reasons that the equity rules for the federal courts and the requirements of the federal courts with reference to findings of fact and conclusions of law in an equity case become pertinent because they secure for us a full hearing in this cause, which has been denied us. The procedural aspects of this case are as follows:

This is a proceeding under 77B of the Bankruptcy Act, in which all attempts at reorganization were opposed by the bondholders over a period of ten months finally culminating in a dismissal of the proceedings as appears by the decree referred to above and sought to be appealed from (Trans., p. 221).

On the 18th day of October, 1934, Oakland Hotel Company, a California corporation, the debtor, filed its petition pursuant to Section 77B of the Bankruptcy Act for its reorganization under the provisions of that act, setting forth its insolvent condition, the possibility of a reorganization, the bond issue on the hotel property in 1910, the purchase of the hotel property by the Chas. C. Jurgens Co., in 1917, involving an investment of that company of One Million Two Hundred Thousand Dollars ($1,200,000.) including advancements by that company of over Three Hundred Thousand Dollars ($300,000.) setting forth facts which showed a substantial equity and that hotel property had returned

a substantial income for many years and the reason why a reorganization would be of any avail (Trans., p. 2).

On October 20th, 1935, an order was entered and filed by the District Court approving said petition as filed in good faith and complying with Section 77B of the Bankruptcy Act (Trans., p. 32).

On October 23rd, 1935, a further order was filed approving the petition as above and appointing Henry Barker as temporary trustee and containing the usual restraining orders (Trans., p. 33).

Thereafter objections were filed to this latter order appointing Henry Barker trustee by the debtor upon the ground that he was the trustee appointed by the Superior Court of Alameda County in foreclosure proceedings by the bondholders and that he represented the bondholders alone and would not be an impartial trustee being opposed to these reorganization proceedings (Trans., p. 38).

On October 23, 1935, the District Court appointed Mr. Charles Beardsley attorney for the trustee. At the same time Mr. Beardsley's firm, Fitzgerald, Abbott & Beardsley, represented the bondholders and have appeared throughout this proceeding for said bondholders opposing the various steps in this proceeding (Trans., p. 37).

Thereafter in due course notice was given to such creditors and stockholders as were known of a day of hearing for the appointment of a permanent trustee.

In the meantime the bondholders, appellees, here, through their attorneys Chickering & Gregory and Mr. Beardsley's firm, filed a so-called answer to the debtor's petition which had already been approved, setting forth that there was no equity in the hotel company, denying the facts alleged in the petition and asking for the dismissal of the proceeding (Trans., p. 73).

They also filed an opposition to the debtor being placed in possession of the property (Trans., p. 64).

A motion was filed by the debtor to dismiss this answer as it was not sufficient under Section 77B in law and did not come within the purview of that section there having been an order already allowing the petition of the debtor (Trans., p. 86).

After these answers and motions had been filed, the matter came on regularly for the appointment of a permanent trustee.

Thereupon, on the 18th day of November, 1934, the District Court referred these issues, including the requested dismissal and the appointment of Henry Barker to the Bankruptcy Referee, W. A. Beasley, as Special Master, to take testimony, ascertain the facts and report said facts with his conclusions (Trans., p. 83). Thereafter a hearing was had before the Special Master on November 30th, December 17th and 18th, 1934, in which a record was made of nearly two hundred pages and evidence was put in by the debtor and the bondholders as to

the value of the equity and the possibility of a reorganization. This hearing consisted of a discussion of law and facts (Trans., p. 250).

Thereupon the Special Master filed his report dated the nineteenth day of December, 1934, holding that the petition of the debtor, Oakland Hotel Company, is filed in good faith and that "there is need for reorganization of the corporation as will appear from the transcript submitted herewith" and giving the debtor until February 15th, 1935, to file a plan of reorganization. The Special Master also recommended the retaining of Henry Barker as trustee until the reorganization had been completed (Trans., p. 89).

This report of the Special Master was confirmed by the District Court on the tenth day of January, 1935 (Trans., p. 103).

Thereafter on February 14th, 1935, a plan of reorganization (Trans., p. 110) was filed by the debtor and a time and place was fixed for hearing the same on the 26th day of March, 1935, before the District Court and notice given (Trans., p. 119).

In the meantime the bondholders through the aforesaid attorneys filed an opposition to the plan of reorganization that the plan was not fair or equitable and was not feasible but not stating any facts and praying that the action be dismissed (Trans., p. 128).

Thereupon when the hearing came up before the

District Court, attorneys for the debtor objected that before a hearing could be had on the plan that the creditors and stockholders must be brought into court as provided by the Bankruptcy Act, sub. 6 of sub-section C of section 77B, their claims and interests filed and evidenced and then passed upon and either allowed or disallowed and notice given to this effect (Trans., p. 168).

The District Court thereupon on the 3rd day of April, 1935, referred the question of this prerequisite to the Special Master by an order requiring him to determine the matter, if he determined it was necessary to comply with these provisions to give the proper notices, hold hearings upon the claims filed, and then hold a hearing on the plan submitted (Trans., p. 134).

Thereupon a hearing was had by the referee upon the question of complying with these provisions of the statute, attorneys for the bondholders filed a long opposition to this proceeding, to the authentication of claims and interests of stockholders as being futile and only interposed for delay.

The Special Master determined on April 17th, 1935, that these provisions must be complied with, as they were jurisdictional (Trans., p. 131).

The Master then made an order which was approved by the District Court giving the creditors and stockholders until May 31st to file their claims and interests setting forth how they should be evi-

denced and fixing June 3rd, 1935, for the hearing of said claims and interests and continuing the hearing on the proposed plan until that date (Trans., p. 134).

The Master sent out the proper notices, claims were filed and the matter came up for hearing on that date.

At that hearing the debtor told of a conference he had held with the local committee of the Reconstruction Finance Corporation at which were present the attorneys for the bondholders; at that conference the local committee made an effort to obtain some idea of how much the bondholders would take in cash or cash and stock for their claims so that a loan could be recommended to Washington upon the hotel property but the attorneys refused to commit themselves or to take any part in the proceedings.

The session of June 3, 1935 (Trans., p. 409), was taken up with these recommendations of the Reconstruction Finance Committee.

No hearing was had as to the feasibility or equitableness of the plan proposed.

The Special Master then filed a report on June 6th, 1935, recommending the dismissal of these proceedings (Trans. p. 170).

It is this report that petitioner is objecting to as containing no findings of fact or conclusions of law or anything upon which conclusions or findings can be predicated.

The difficulty arose on the procedure heretofore followed in these matters, the report not being drawn in accordance with Local Rule 46 which is the equity rule, but being filed under Rule 7, Bankruptcy, which gave no time for exceptions or correction of the report.

Your petitioner obtained an order giving him twenty days for exceptions (Trans., p. 74) but the first time he had opportunity to object to the procedure was in these exceptions.

The first time he had opportunity to ask for special findings was in these exceptions. This is an equity proceeding to which Rule 46 of the District Court and Rules 70½ and 66 of Equity apply.

The petitioner duly filed his exceptions to the report of the Special Master to which attorneys for bondholders filed a reply claiming this was not an equity proceeding and these did not apply (Trans., p. 180). They also filed briefs to that effect.

Attorneys for petitioner filed a petition for rehearing particularizing these Equity rules which the District Court considered at two hearings, but finally denied (Trans., p. 226).

During this period the real power over the bonds was exercised by a bondholders committee who were opposed from the very beginning to any reorganization, so that in effect the feasibility or benefit of any scheme for reorganization was never submitted to the bondholders themselves. The bondholders

committee from the very beginning was determined that there should be no reorganization. This is very evident from the record here. The trustee, Barker, was appointed temporary trustee because he had been a receiver representing the bondholders in the foreclosure proceedings in the state courts. This was enough to disqualify him but at any rate he was appointed temporary trustee over the objection of the debtor. His attorney, Mr. Beardsley, was also attorney for the bondholders. It followed, therefore, that any scheme of reorganization would receive no assistance whatsoever from this trustee although he was supposed to represent the debtor as well as the creditors. He was adverse to Mr. Jurgens and the Hotel Company throughout this proceeding. The ordinary precaution taken in the receivership was not taken in this proceeding by the lower court, that is, that there should be an impartial trustee appointed. We have no criticism of Mr. Barker in the management of the hotel; as far as we know, his management was perfectly honest but he was not a live, up-to-date hotel man. He was under dictation of the bondholders committee and of Mr. Beardsley, also, attorney for the creditors, so that the proceeding resolved itself into a fight with the trustee and with the bondholders committee on one side and the debtor on the other, the debtor trying to keep himself in court to save his equity and the trustee and the bondholders committee at every opportunity asking for a dismissal of the proceeding. Under these circumstances there could be no

consideration given to a reorganization plan. The proceedings of June 3, 1935, which were the last proceedings before the Master, reveal this. It is not intended by the amendatory act of 77B that if the plan proposed is not satisfactory there shall never be any other plan proposed. With this in mind, we took up with the Reconstruction Finance Committee of San Francisco the proposal of loaning money on the hotel in order to pay off the bondholders who up to that time had been willing through their committee to accept $400,000.00, which would be sixty cents on the dollar. In May, 1935, the Reconstruction Finance Corporation formed a mortgage company for the financing of apartments and hotels and the San Francisco committee was more than willing to consider the proposal of the Oakland Hotel Company, but under the procedure of the Reconstruction Finance Corporation, the consent of the bondholders had to be secured first and it had be ascertained what the bondholders would take for their claims. We were stymmied again there because the bondholders committee would not listen to any proposal along that line. The proceedings of June 3, 1935, with regard to this proposal, tell their own story. The proceedings of June 3, 1935, were the only proceedings in the whole record with reference to any plan of reorganization. Under paragraphs 6 and 7 of subdivision (c) of Section 77B, it was necessary that proper notices should be given to the stockholders and the bondholders for the filing of their claims and their interests and that there

should be a determination of and approval of the claims and interests before any plan of reorganization should be voted upon. This jurisdictional notice and hearing was opposed by the attorneys for the creditors and the trustee and it was only after a great deal of argument that we were able to persuade the Master that it was necessary and after these claims and interests had been brought into court the only proceedings in the matter of the reorganization are those of June 3, 1935.

On the question of the adequacy of any findings of fact and conclusions of law and the adequacy of the final report of the Master dismissing the proceeding, we had two arguments in the lower court. We went into the matter thoroughly. The lower court finally upon the assurance of the attorneys for the creditors that they considered no findings of fact and conclusions of law necessary and that they were willing to take their chances in the appellate court, denied the rehearing. The lower court made no findings of fact or conclusions of law and simply confirmed the dismissal of the proceeding by the Master. The Master's final report did not ascertain and report the facts and his conclusions as he was ordered to do by the reference but simply recommended a dismissal. It was all very arbitrary and in accordance with the policy of the attorneys for the creditors and the trustee to secure a dismissal of this proceeding from the very beginning. This is contrary to the spirit of the act and to the de-

cision of the Supreme Court of the U. S. in dealing with trustee matters.

Weil v. *Neary,* 278 U. S. 160, at p. 168.

This is purely an impersonal criticism of the attorneys in this case. There is no question about their honesty or integrity or their standing at the Bar but even leaders of the Bar must eat. One unfortunate circumstance of this case was that the trustee was not an impartial trustee by virtue of his appointment, he having all along before he was appointed, represented the creditors, and his attorney represented the creditors. We had no objection to the appointment of the attorney for the creditors in the preliminary proceeding but this was before the opposition of the creditors to the proceeding had gathered volume and they had formulated their opposition in an answer which occasioned the whole delay in this matter of any reorganization. We doubt if they were within their rights because the court had already found that the petition had been filed in good faith and it is the opinion of some of the courts that this answer of creditors should be interposed before the court finds that the petition is filed in good faith. However, we never had the benefit of the trustee who represented the debtor as well as the bondholders committee in this matter, so that the procedural steps become of importance in this matter and they are important for another reason. We are continually accused of delay here, whereas the court will see by an examination of the record that the delay was occasioned by this opposition.

The Court will also see that no plan of reorganization would ever have been acceptable to this bondholders committee. What their purpose was is not revealed by the record so we are not permitted to draw any inferences. So much for the procedural aspects of the proceeding.

All the testimony of this case went into the hearing of the creditors answer and motion to dismiss. There is a wide diversity of testimony as to the value of the hotel property and the value of the hotel property was never found by the master or the judge. The Master simply found that there was an occasion for the reorganization of this property. The testimony showed on the part of the petitioner that the property was worth the value, according to the insurance appraiser and considering the value of the real estate basing it upon the price paid for the post office site of $1,500,000.00 (See Plaintiff's Ex. 3), which is the insurance appraisal requested by the bondholders committee, and testimony in reference to the post office site which was bought by the U. S. Government. Then there was testimony as to the reproduction value of the hotel. (See the testimony of Eric H. Frisell (Trans., p. 355).) He described the hotel building, its solidity, massiveness, the framework and we filed a statement of the production costs of the building and the additions thereto for the years 1912, 1915, 1925. The original cost was $1,299,191.51, and Mr. Frisell, an engineer whom everyone recognizes as being experienced in such matters stated that to the best of his opinion a

reproduction of a building of this type at the present time would be 102%, and he states his reason (Trans., pp. 360-362). There is a wide diversity between these opinions and the opinions of Mr. Kitrelle that the whole property, building and real property, was worth only $526,000.00, but he bases his estimate upon income, which we understand has been abandoned as a basis of income by the government, or at least it is only used in connection with other forms of estimate so that by referring to the Plan of Reorganization proposed (Trans., p. 110), it will be observed that we have used the three methods. The value of the land as stated in the plan of reorganization is $550,000.00. This was the price paid for the post office site, which was of identical dimensions with the Oakland Hotel property in the year 1929. It may be higher than the price obtainable now, although they maintain the prices are rising in real estate in Oakland but at least there is enough there to show a value of around a Million Five Hundred Thousand ($1,500,000.00) Dollars. At any rate none of these matters were thrashed out at any hearing as no value was ever placed upon the hotel which would seem to be necessary before the consideration of a plan of reorganization could take place.

The plan of reorganization to which we call the attention of the Court is not an inequitable one based upon that value (Trans., p. 110). But, we were perfectly willing to change the plan in any

particulars which would meet the approval of the bondholders. Under this plan of reorganization the bondholders could obtain the property on and after July 1, 1942, if the interest paid to the holders of the bonds did not hold up to expectations. We were also willing to practically turn over the control of the company to the bondholders, as will be seen by reading Article IV of the Plan. We were also willing to escrow all stock of The Charles Jurgens Co., to be turned over to the bondholders in 1945 if the interest did not hold up. These items and dates could easily have been changed in a round table conference but the bondholders committee opposed any such plan from the beginning. Their objections to the Proposed Plan, however, were made before there was a proper procedural compliance with the requirements of the act. The only hearing of any kind after the claims had been filed and approved, was the hearing of June 3, 1935. There was never any abandonment of this property by The Charles Jurgens Co., or the Oakland Hotel Company. They did not relinquish their title. Their property was never foreclosed before this proceeding was commenced. There never was any virtual abandonment of the property. When The Charles Jurgens Co. found it could not advance any more money to carry on the hotel, it was about to close it but the Chamber of Commerce of Oakland asked them to keep it open until they could find a lessee. They finally hit upon E. C. Wood & Co., who proceeded to gut the hotel of its equipment and then went bankrupt. It

became necessary to bring foreclosure proceedings in order to terminate their lease. There never was any abandonment either physical or legal of the property. This Court is not interested in abandonment any way because at the time that the proceeding was commenced under 77B, the Oakland Hotel Company were still owners of the property. But what occurred at this time will be found by reading the testimony of Mr. Jurgens and the copies of the minutes of The Charles Jurgens Co., (Debtor's Ex. 20). The testimony of Mr. Jurgens with reference to the closing of the hotel and the circumstances thereof will be found in the latter part of this testimony (Trans., pp. 372-375).

During the period when Mr. Jurgens was managing the property for the Oakland Hotel Company, $90,000.00 worth of bonds were retired. His standing as a hotel man is attested to by leading hotel men of the state as will be observed by the record who testified as to the esteem in which he was held. He was also a member of the National Committee of Hotel Men consisting of five men in the United States operating under the N. R. A. The hotel went through the period of depression like the other prominent hotels of the country. It was the center of the civic and social life of Oakland and it could be made so again with the proper handling. At least the attempt should be made for the sake of the bondholders as well as of the debtor. If it is found that this is impossible within the next seven years,

then the property could be relinquished to the bondholders but the real estate value will probably have increased in the meantime and the building is so solidly and massively built that it cannot deteriorate to any extent during that period. (See testimony of Frisell (Trans., p. 355).) This brings us to the purpose of Section 77B of the Bankruptcy Law.

THE PURPOSE OF 77B OF THE BANKRUPTCY LAW.

Section 206 of U. S. C. A., Bankruptcy, Title 11, provides:

> "Additional jurisdiction. In addition to the jurisdiction exercised in voluntary and involuntary proceedings to adjudge persons bankrupt, courts of bankruptcy shall exercise original jurisdiction in proceedings for the relief of debtors, as provided in section 207 of this chapter. (July 1, 1898, c. 541, Sec. 77A, as added June 7, 1934, c. 424, Sec. 1, 48 Stat.)"

The act, then is primarily for the relief of the debtor but the secured creditors, bondholders and the unsecured creditors are certainly not to be neglected. If the only purposes we could see in this proceeding were to delay the creditors from obtaining their just claims, there would be no appeal in this case. If we could see no equity in the debtor there would be no appeal. If we could see no prospect of this hotel property to build up revenue within the next seven years, there would be no ap-

peal in this case. The purpose of the act has been well defined in a number of decisions. It is not even necessary that there should be an equity before a plan of reorganization is approved. Section 77B was not enacted only for the benefit of corporations in embarrassed circumstances but for corporations who were insolvent. The constitutionality of the act has been upheld in a number of cases.

In re Central Funding Corporation, 75 Fed. (2d) 256; See latter part of opinion, p. 261.

Also:

In re Prudence Bonds Corp., 75 Fed. Rep. (2d) 262;

In re New Rochelle Coal & Lumber Co., 77 Fed. (2d) 881.

We wish particularly to quote from the case referred to by this Court in the recent case of *San Francisco Building Coporation* v. *Battson, supra*:

Central States Life Insur. Co. v. *Koplar,* 80 Fed. (2d) 754, at p. 759-760:

"In this situation and before any action had been taken on the proposed plan of reorganization and while a motion of appellant to modify the order classifying creditors was pending, this appeal was taken. The appeal is from an order denying the appellant to foreclose its deed of trust on the Park Plaza Hotel properties, and is bottomed on the propositions: (a) That since the first liens of appellant are valid and undisputed, (b) since the debtor has no equity in the above properties over and above

the first and second deeds of trust thereon, and (c) since said properties are therefore burdens on the estate of the bankrupt, appellant has an absolute right to foreclose under the provisions of section 77B, outside of the bankruptcy court, and so the denial of this right of foreclosure by the court *ni si* was error. And this denial is the sole error urged for reversal."

* * * * * *

"For the major part the cases urged on us as controlling arose under the Bankrupt Act (11 U. S. C. A.) as it stood prior to the enaction of section 77B. It is not only clear, but there is controlling authority for the view, that the above section worked a rather radical change in the law on the precise question before us here. Continental Ill. Nat. Bank vs. Chicago, Rock Island & P. R. Co., 294 U. S. 648, 55 S. Ct. 595, 79 L. Ed. 1110.

In the above case it was said (294 U. S.) 648, at page 676, 55 S. Ct. 595, 606, 79 L. Ed. 1110): 'It may be that in an ordinary bankruptcy proceedings the issue of an injunction in the circumstances here presented would not be sustained. As to that it is not necessary to express an opinion. But a proceeding under Section 77 (11 U. S. C. A. Sec. 205) is not an ordinary proceeding in bankruptcy. It is a special proceeding which seeks only to bring about a reorganization, if a satisfactory plan to that end can be devised. And to prevent the attainment of that object is to defeat the very end the accomplishment of which was the sole aim

of the section, and thereby to render its provisions futile.' * * *

The record shows that when the order here complained of by the appellant was entered, a plan of reorganization was pending, undisposed of; likewise a motion made by appellant to reclassify creditors was pending. The record discloses that there would not be any equity for any other creditor, secured or unsecured, in the Park Plaza Hotel, over and above the sums due on the first, the supplemental chattel, and second mortgages thereon, and even as to the second mortgage there would be a deficit, whereof the amount had not yet been ascertained. The trend of the hardly disputed evidence was that it would cost now to reproduce the Park Plaza Hotel well-nigh what it cost to build and furnish in 1929 when it was constructed. And so the estimated fair value of the hotel and its furnishings exceeds by $500,000 the aggregate of outstanding bonds in both the first and second mortgages. The evidence conclusively showed that there is now, that is when the order was entered, no market whatever for this hotel. So, it is not difficult to see that if sold now, no one except appellant could be or would be a bidder at such sale, and an unnecessary sacrifice of value would occur, with the result that the deficiency to be allowed in favor of appellant as a general creditor would be shockingly unjust to the estate and to other unsecured creditors, as also to the holders of bonds secured by the second mortgage. Even by the proposed plan pend-

ing before the court, the claims of these latter bondholders were not definitely fixed. As to them the proposed plan merely said: 'The holders of the said second mortgage bonds have claims against the debtor in excess of the value of their securities. The amounts of their claims should be determined and adjudicated in the proceeding herein in accordance with the provisions of section 77B of the amendment to the Bankruptcy Act. When the amounts of the claims of the second mortgage bondholders in excess of their securities have been thus determined, the said claims will be treated as claims of general creditors and the said bondholders will be entitled to participate in the provision made for general creditors as hereinafter provided.'

Moreover, it seems clear from the language and provisions of section 77B, supra, that the approval and confirmation of the proposed, or any, plan of reorganization is a matter of the bankruptcy court. Proposal of a plan rested with those empowered by the act to propose, but disposal rested with the court. Certainly is this true of a plan not yet accepted by any party, or class interested, save by implication the debtor alone, which presented it. The question whether a plan, accepted by every part in interest and by the requisite number of each class of creditors, yet leaves any discretion as to approval by the bankruptcy court, is not involved here; for this is not the case presented.''

This case is the nearest of any which we have found to the facts herein presented. The lower

court, then seems to have the discretion to determine what is an equitable plan of reorganization under Section 77B but this discretion was never exercised in the present case. Instead of that, the proceeding was summarily dismissed. We come, then, to the proposition that the court erred in not having any hearing or making any determination as to the feasibility or fairness of the plan proposed or of any plan.

THERE WAS NO HEARING OR DETERMINATION OF A PROPOSED OR ANY PLAN OF REORGANIZATION

The only hearing was that of June 3, 1935 (Trans., p. 409), at which the proposed plan was not even discussed and the plan proposed by the Reconstruction Finance Corporation was not even given any consideration. The debtor's attorney was not even permitted to question the bondholders committee as to the acceptibility of the plan proposed by the Reconstruction Finance Corporation, the only thing in the mind of the Master and of the attorneys for the creditors was a summary dismissal of the proceeding. It is not necessary to quote here again the proceeding before the local Reconstruction Finance Corporation. That will be found in the proceedings of Monday, June 3, 1935, before the Master, although the number of letters now in evidence among the original exhibits show that the bondholders committee was willing to consider a

proposal of $400,000, cash, for the bonds or even payments in installments. They would not agree to this before the Master. They were sure the proceeding would be dismissed. The Master mistook the rules of the Reconstruction Finance Corporation and said that the Reconstruction Finance Corporation should make the proposal of a loan before the Master. This Court knows that the Reconstruction Finance Corporation does not proceed in that way. The bondholders would have to agree to accept a certain amount for their bonds. Then the Reconstruction Finance Corporation would consider whether they would loan that amount on the Hotel Oakland. The local committee gave every encouragement to the debtor to proceed for an application for his loan but this was stopped by the bondholders committee. The Master would not even permit an examination to be made by the attorney for the debtor, of the bondholders committee or the president of the Central Bank of Oakland as to what they would recommend to the bondholders. The proposed plan was never discussed. It seemed a futility to discuss it under these circumstances so the recommendation was made to dismiss.

REPORT OF SPECIAL MASTER OF JUNE 6, 1935, RECOMMENDING DISMISSAL.

(Trans., p. 170.)

There are no findings of fact in this report or any conclusions of law. We submit that the follow-

ing is not a compliance with the reference.

"At the first hearing before me, Mr. Jurgens, the President of Oakland Hotel Company, stated that he thought he might be able, if given time, to procure money with which to satisfy the bondholders to an extent that would induce them to approve a plan of reorganization. Upon this slim promise, and with the idea of giving this company every possible opportunity to rehabilitate itself, the matter was continued and has been continued until this date. There seems to me to be no reasonable propect that sufficient money can be raised to satisfy the bondholders and that owing to the long period of time which has elapsed since the proceedings were first begun, the accumulated interest which has been unpaid and the fact that so far no real progress seems to have been made in securing money with which to effect a reorganization, and the fact, which I believe to be true, that new money must be secured if a reorganization is to be effected, I think the proceeding should be dismissed and that the bondholders should be permitted to pursue their remedy in the state court. The state court is entirely competent to foreclose the mortgage in the proceeding now pending before it. To continue the matter in the hands of the Federal Court, it seems to me, would simply result in enlarging the expense already accrued and would result in no benefit to the debtor. I was advised at the time of the hearing that it would take three or four months to foreclose the mortgage in the state court and thus this additional time would be secured to

the debtor by such proceedings, whereas, if liquidated in the bankruptcy court, the sale of the property would be very much more speedy and the debtor would be deprived of time he might have if the matter were returned to the state court, where it originated. Nor will an adjustment between the bondholders and the debtor be prevented by such return of the proceedings to the state court. It is plain that no adjustment can be made in the Federal Court.

I, therefore, recommend that the proceeding be dismissed and the matter relegated to the state court for such further proceedings as it may see fit to take."

This is purely a summary action upon the part of the Master. In the first place there is no testimony anywhere in the record that Mr. Jurgens stated that he might be able to procure money to satisfy the bondholders. There is no provision in the act for a plan of reorganization which must provide cash to compensate all bondholders. If this were so, it would not be a plan of reorganization. The Master had evidently forgotten the earlier proceedings in the case being continually pressed to dismiss the proceeding and gave way before the onslaught. At any rate it will be apparent to the Court that the Master made no finding of approval or disapproval of any plan of reorganization. He held no hearing and made no finding as to the equity or fairness of the plan. He held no hearing and made no finding as to the value of the property upon which the reorganization could be based. The Master in this case it

seems to us never did conceive the purpose and spirit of section 77B, but it was continually pressed upon him that it was his conscientious duty not to permit any further delay in the foreclosure of the mortgage and that he was withholding property from the bondholders. Whereas, the outcome of a foreclosure will be that the bondholders will receive nothing. That this is not a sufficient report we have ample authority but will only quote the case of *Toledo P. W. R. R. Co.* v. *Peoria, etc., R. R. Co.*, 72 Fed. (2d) 745, at page 747:

> "It is argued that the decree cannot stand because the court did not make findings of fact as provided by Rule 70½ (28 USCA sec. 723). This should have been done by the court or the master. If performed by the master the court should either correct, reject, or adopt such findings as its own. In the case before us the court decreed: 'That the exception filed herein on behalf of Toledo, Peoria and Western Railroad, Toledo, Peoria and Western Railway Company and Samuel M. Russell, former Receiver of Toledo, Peoria and Western Railway Company, be and the same are hereby overruled and the report of said Special Master is hereby approved. * * * '
>
> While the ruling upon the exceptions to the master's report is not proper part of the decree of a court of equity, we are not prepared to ignore the ruling solely because of the place where it appears.

> The trouble in this case is that the master did not make satisfactory findings. He divided his report into five heads: a statement of the case; findings as to law in the case; payment under protest; construction by the parties; and conclusions. Under his conclusions he said; ' * * * I find the issues with the Peoria and Pekin Union Railway Company, the Intervener herein * * * '.
>
> We are not as much interested in the names given to the subdivisions of the report by the master as to the contents thereof. We can ignore the names. The purpose of a reference, if it be to take testimony and make findings of fact and conclusions of law, is met only by the master's careful preparation of findings on all material issues. The findings are far more important than the conclusions."

The Master's report was not prepared in accordance with Equity Rule 46 of the District Court, and he gave no opportunity for proper objections before the filing of the report. In fact, it has been the custom up to the time of the trial of this case, for the Master to proceed under Rule 7 of the Bankruptcy Rules which has no application to an equitable proceeding of this kind. It followed that we had no opportunity to present a request for special finding except in our exceptions to the report after filing, and this could only be taken up by the judge. That these equity rules apply to bankruptcy proceedings has been held in this circuit in the case of *In re Pierce,* 210 Fed. Rep. 389.

Rule 46 of the local court is supplementary to Rule 66 of the Equity rules of the Supreme Court. Proceedings heretofore in these cases have been under an entirely erroneous idea of the functions of the Master. Heretofore, when the Master has filed his report he has done so under Rule 7 of the Bankruptcy Rules and which have nothing to do with this kind of proceeding, and his report was set down the following Monday for consideration and there was no time for proper exceptions.

Rule 7 refers to reports of the referee and petitions for review of orders of the referee covered by bankruptcy rule of the Supreme Court, 27.

Bankruptcy Rule 37 and Equity Rule 61½ apply to this case. Likewise Rule 12, sub. 3 Bankruptcy, Supreme Court, amended April 17, 1933, applies to this case for it provides that the judge may refer an application in proceedings under 77B to a Special Master to ascertain and report the facts. So it appears that local Rule 46 and not local Bankruptcy Rule 7 applies to the procedure in this case. In this case all the references were made to Judge Beasley as Master in Chancery and not by virtue of his office as referee. Any other qualified person could have been appointed. It followed that we had no opportunity to present any objections to the Master's report before it was filed. We could only present the exceptions to the court which was done, and in this instance we called attention to the lack of any findings as to value, or as to the equitableness

or fairness of the plan, to which we were entitled. We also renewed this upon a petition for rehearing.

THERE ARE NO FINDINGS IN THE REPORT OF THE SPECIAL MASTER OF JUNE 6, 1935, BUT ONLY A SUMMARY DISMISSAL OF THIS CASE.

Local Equity Rule 46 which is supplementary to General Equity Rule 66, applies to this proceeding to which we bring the authority of *In re Pierce,* 210 Fed. Rep. 389, and

Continental Ill. Nat'l Bank v. *Chicago, Rock Is. & P. R. Co.,* 294 U. S. 648.

Under that recent decision by the Supreme Court this is an equity proceeding and the decree is an equity decree. The report of the Master herein, therefore, was not in conformity with local rule 46. There was no opportunity given for objections to a draft report or a request for special findings. The answer of the attorney for the creditors is that we did not request any special findings and made no objections to the Master's report. This is an evasion. We had no opportunity to do either of these things as is apparent by the record. The report was filed on June 6, 1935, and placed on the calendar for the next Monday. Our only recourse was to obtain twenty days from the court for exceptions and ask for special findings in the exceptions. This was done but the exceptions to the report were overruled. In this report the plan of reorganization or any plan of reorganization was neither approved or disap-

proved. Its provisions were not even mentioned. There was no finding in this report as to the value of the property or as to the equitableness or fairness of the plan, and no mention made of the proposal of the Reconstruction Finance Corporation. The exceptions were overruled and the report of the Master approved without any findings of fact or conclusions of law by the lower court. We thereupon asked for a rehearing and called the attention of the local court to the requirements of Equity Rule 70½. This was argued at two hearings.

APPLICATION OF EQUITY RULE 70½.

That Equity Rule 70½ applies to this proceeding needs no long discussion. This is an equity proceeding and the decree is an equity decree, as stated above, citing the Chicago Rock Island case. The order entered by the court did not contain in substance or form any findings of fact or conclusions of law (Trans., p. 221).

See:

Toledo, etc., R. R. v. *Peoria, etc., R. R.* 72 Fed. (2d) 745,

already quoted from.

Also:

Meadows v. *Cheshire,* 58 Fed. (2d) 628.

That the case should be sent back for proper findings of fact and conclusions of law.

See:

Borden's Co. v. *Baldwin,* 293 U. S. 213;
Los Angeles Gas. Co. v. *Railroad Commission,* 289 U. S., pp. 327-331;
Siano v. *Helvering,* 79 Fed. (2d) 444.

These are enough authorities on this point as the court is well conversant with the rule. But there can be no proper findings of fact or conclusions of law in this case unless a further hearing is given upon the plan proposed or its modification. There should be a determination of the value of this plant, and we should be permitted in an open discussion with the bondholders to discuss the plan or modifications thereof. It is said that we had full opportunity to do so. Under the circumstances of this case, it appears that we did not, for there was continual pressure to dismiss the case and when the matter was submitted on June 3, 1935, the Master gave us no further opportunity but summarily dismissed the proceeding. It is said that the plan proposed was disapproved by the majority of the bondholders. The bondholders themselves never attended any meetings or hearings. As is usual in these cases they were entirely in the hands of the bondholders committee. As a matter of fact, the bondholders committee still control the majority of the bonds. (See Debtor's Ex. 1, par. sixth.) The bondholders committee still had a lien on all these bonds which was not released. No notices of termination or notices of withdrawal were given by the committee or

by depositors. (Statement of Mr. Beardsley at opening of the case (Trans., p. 258).) They were the virtual owners of the bonds and although they disclaimed any such purpose they continually acted throughout this case for the bondholders. (See Bondholders' Protective Agreement, dated December 21, 1931, Debtor's Ex. 1.)

E. T. Kenney Co., 136 Fed. 451;
Bullard v. *Cisco,* 290 U. S. 179-180.

As far as the stockholders are concerned, 95% of the stock is held by The Chas. Jurgens Co., who authorized this action and the proposal of the plan of reorganization so that the acceptance by the stockholders is of no moment, for the stockholders themselves began the action and proposed the plan.

In conclusion, it is well to say that Section 77B is a remedial piece of legislation. It was passed primarily for the benefit of the debtor, as appears by Sec. 206, USCA, Title 11, Bankruptcy. It is also true that it protects the bondholders as well as the debtor from a forced sale under which none of the parties realize any substantial amount on their interests. To the banks it is revolutionary, perhaps, because under the old system they considered that mortgaged property virtually belonged to them. Attorneys and courts who have been engaged in building up property rights during the years have a difficult time reconciling themselves to this legislation, although it is not necessarily new, moratoriums being known during or after each de-

pression in economic history. It is this opposition, however, which has delayed any effective consideration of any plans in the present case. It is also to be noted that the Jurgens family who invested a large part of their fortune in this hotel and afterwards mortgaged the remainder during the depression to carry it on and see that the tradesmen were paid, had nothing to do with this bond issue (Trans., pp. 369-370). The bonds were issued in 1910 before there was any Blue Sky Law in this state and during that so-called era of wonderful nonsense it was one of the indulgences of the investment bankers to issue bonds and sell them to the public on hotels and apartment houses. They not only sold them to the public but they invested estate and trust funds in these bonds. This happened in this very case. We particularly impress this upon the Court. The record shows that there are a number of trust estates which hold these bonds (Trans., pp. 49-55; pp. 155-158). They will never realize anything if this property is sold on foreclosure. It may be that they will realize return on these bonds if the hotel property is reorganized and recovers its former status in the City of Oakland. At least it is worth trying.

Finally, there has never been any attempt on the part of the Oakland Hotel Company or Mr. Jurgens to delay this proceeding for any purpose other than to be given a chance to restore the hotel to its former state, having an abiding faith that it can be done. The Jurgens company never abandoned the hotel,

but their only relief came when Section 77B was passed. They have been met, however, by a resentment against this Act of Congress as an obstacle in the way of the banks and bondholders committee to secure this valuable property and apply it to their own purposes.

There is another appeal here on the question of attorneys' fees.

PETITION FOR PAYMENT OF ATTORNEY'S FEES AND COSTS EXPENDED BY DEBTOR IN CARRYING OUT THE PURPOSES OF 77B

(Trans., pp. 187, 203.)

In order to support our appeal from the disallowance of any attorneys' fees or any costs or expenses which we have incurred in this proceeding, we also appeal from the Order Allowing $5,000.00 attorneys fees for the creditors. We will not indulge in any long plea for the allowance of these fees. We are more concerned with obtaining justice for the petitioner in bankruptcy here. We were not greatly concerned with the allowance to the attorneys for the creditors as they certainly earned their money as far as the amount of work is concerned. Whether their work will inure to the bondholders or not is another question. Also, the amount of our fee was based upon the amount of work done, which speaks for itself, and upon the proposition that if the attorneys for the creditors were entitled to $5,000.00

for opposing the reorganization, we were entitled to more for carrying the proceeding through and attempting to preserve the property for the debtor as well as the bondholders and for carrying out the purposes of the act. This Court has the power to fix these fees upon a summary appeal and we only ask a reasonable amount based upon the estate of the debtor.

USCA, sec. 207, subdiv. (c), subsec. (9), provides for a reasonable compensation for services rendered and reimbursement for expenses incurred in connection with the proceedings and the plan by attorneys for parties in interest and for the debtor. It now transpires under all the authorities that while those who have had to do with the proposal and reorganization of the company are entitled to fees, the attorneys for creditors and special interests are not entitled to fees out of the estate but must look to their clients.

We content ourselves with citing the following authorities:

In re Wayne Pump Company, 9 Fed. Supp. 940;
In re Kentucky Elec. Power Corp., 11 Fed. Supp. 528;
In re Selton Nat'l Fiber Can Co., 13 Fed. Supp. 83;
In re Kelly Springfield Tire Co., 13 Fed. Supp. 724;
In re Flamingo Hotel Co., 81 Fed. (2d) 749;
In re Hertz, Inc., 81 Fed. (2d) 571;

In re National Lock Co., 82 Fed. (2d) 600.

We content ourselves with quoting the following from *In re Wayne Pump Co., supra*:

> "The attitude of counsel for the committee after the first brush or two in court was conciliatory and constructive, and regardless of the motives of the committee, resulted in a compromise reorganization beneficial to the company, and not prejudicial to the rights of the bondholders. The activities of the law firms were of great value to the estate. Bad advice at this point in the proceedings could very easily have resulted in prolonged litigation with possible appeals and unpreventable delays, which would in all probability have destroyed the very purpose of the act and the reorganization proceedings.
>
> The court is persuaded that counsel, when acting in good faith, should be encouraged to advise and persuade clients whenever possible to assist in and co-operate with, an honest endeavor to reorganize industry, and that they should be assured by the courts that such constructive conduct on their part will meet with reward commensurate with the character of the assistance rendered and the results obtained, rather than that such counsel will be penalized for shortening, instead of prolonging, the court procedure.
>
> On the other hand, the hasty organization of the so-called 'protective committees' who volunteer advice to bondholders and solicit holders of securities not to go along with a company reor-

ganization, suggesting a better method to be proposed and advising the revocation of assents already made, as was done in this case, should, to say the least, be scrutinized carefully by the court when asked to make liberal allowances to the members of such volunteer committee."

Respectfully submitted,

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